

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Washington, D.C.**

**THE ACADEMY OF MAGICAL ARTS, INC**

**and**

**Case 31-CA-166705**

**AMERICAN FEDERATION OF MUSICIANS,  
LOCAL 47**

**COUNSEL FOR THE GENERAL COUNSEL'S  
BRIEF IN SUPPORT OF EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## **I. INTRODUCTION**

This case was submitted to the Honorable Joel P. Biblowitz (“ALJ”) on December 6, 2016 pursuant to a Joint Motion to Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts (“Motion”) submitted by Respondent Academy of Magical Arts, Inc. (“Respondent” or “AMA”), Charging Party American Federation of Musicians, Local 47 (“Union”), and Counsel for the General Counsel. The proceeding was based upon an unfair labor practice charge filed by the Union against the Respondent and a complaint issued by the Acting Regional Director of Region 31 on May 27, 2016 (“Complaint”). (GC Exh. 1(d)).<sup>1</sup>

On January 10, 2017, the ALJ issued his decision and order. The ALJ concluded that the Respondent violated Section 8(a)(5) of the Act by unilaterally ceasing to pay its unit employees premium pay for work performed on the evening of December 31, 2015. (ALJD 7:35). The ALJ dismissed the following allegation, to which the General Counsel excepts: the Respondent violated Section 8(a)(5) of the Act by making changes to bargaining unit employees’ shifts in about October or November 2015. (ALJD 6:45).

Based on the entire record in this matter and the arguments presented below, Counsel for the General Counsel respectfully excepts to the ALJ’s findings and conclusions with respect to the allegation that the Respondent violated Section 8(a)(5) and 8(a)(1) by unilaterally changing employees’ schedules.

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<sup>1</sup> References to the Record are abbreviated as follows: Jt. Motion followed by paragraph number or page number (Joint Motion to Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts); ALJD page number followed by the line numbers (ALJ Biblowitz Decision); Jt. Exh. followed by the page number (Joint Exhibits); and GC Exh. followed by the page number (General Counsel Exhibits).

## **II. RELEVANT FACTS**

### **A. Background**

At all material times, Respondent has been a corporation with an office and place of business in Hollywood, California. (ALJD 1). Respondent's facility has been a private club operating a restaurant, entertainment venue, and bar engaged in the retail sale of food and entertainment. (ALJD 1). At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act. (ALJD 7:20). The Union has represented musicians at AMA since at least 2010. (ALJD 2:10).

### **B. Respondent Made Unilateral Changes to Employee Shifts**

On June 22, 2015, the Respondent and Union ("the Parties") entered into a new Master Agreement ("Master Agreement"), which incorporates the AMA Employee Handbook and which is effective from July 1, 2015 through June 30, 2018. (ALJD 2:15). Prior to entering into the Master Agreement, the Parties were subject to an Area Standards Agreement ("ASA"). (ALJD 2:15). During bargaining for the Master Agreement, the Parties discussed Respondent's desire to make changes to Unit employees' shifts. (ALJD 3:45-50). The Union's proposal was that Unit employees *not* take a pay cut as a result of the implementation of changes to shifts (emphasis added). (ALJD 3:45-50).

#### **1. Relevant Contractual Provisions**

Article IX, Section A of the Master Agreement, titled "Employer's Rights," reads:

The Employer retains, solely and exclusively, all the rights, powers, and authority which it exercised or possessed prior to the execution of this Agreement, except as specifically abridged by this Agreement. Without limiting the generality of the foregoing, the rights, powers, and authority retained solely and exclusively by the Employer include, but are not limited to the following: To manage, direct and maintain the efficiency of its operations and personnel; to manage and control its departments and facilities; to create, change, combine or abolish positions and jobs, departments and facilities in the whole or in part, to subcontract or

discontinue functions and activities, to direct its staff; to increase or decrease its staff and determine the number of employees; to hire, transfer, promote, demote, suspend, discharge, maintain the discipline and efficiency of its employee; to lay off employees; to establish work standards and rules, schedules of operation and workloads; to specify and assign work requirements and require overtime; to assign work and decide which employees are qualified to perform work; to schedule and change working hours, shifts and days off; to adopt rules of conduct and safety rules, and penalties for violations thereof; to determine the methods, processes, means and places of providing services; to determine the location and relocation of facilities; and to effect technological changes. The Musicians shall at all times conduct themselves in accordance with all applicable laws and shall observe professional decorum in the performance of their duties. The Musicians shall also adhere to such reasonable rules and code of conduct as the Employer may promulgate. (ALJD 2-3:45; 5:20).

“Addendum A” to the Master agreement states:

**Wage Scale for Musicians First Employed on or before the Execution of This Agreement:**

**Musician Lead** (currently Richard Allen):

Shift I Mondays through Thursdays from 6:00 p.m. to 12:00 a.m. - \$50 per hour  
Shift II, Fridays from 12:00 p.m. to 2:00 p.m. - \$50 per hour  
Shift III, Saturdays and Sundays from 10:30 a.m. 3:00 p.m. - \$67 per hour  
Shift IV, Fridays from 5:30 p.m. to 9:30 p.m. - \$75 per hour  
Shift V, Fridays from 9:30 p.m. to 1:30 a.m. - \$75 per hour  
Shift VI, Saturdays from 5:30 p.m. to 9:30 p.m. - \$75 per hour  
Shift VII, Saturdays from 9:30 p.m. to 1:30 a.m. - \$75 per hour  
Shift VIII, Sunday from 5:30 p.m. to 11:30 p.m. \$50 per hour

**Musician:**

Shift I, Mondays through Thursdays from 6:00 p.m. to 12:00 a.m. - \$42 per hour  
Shift II, Fridays from 12:00 p.m. to 2:00 p.m. - \$42 per hour  
Shift III, Saturdays and Sundays from 10:30 a.m. 3:00 p.m. - \$55 per hour  
Shift IV, Fridays from 5:30 p.m. to 9:30 p.m. - \$63 per hour  
Shift V, Fridays from 9:30 p.m. to 1:30 a.m. - \$63 per hour  
Shift VI, Saturdays from 5:30 p.m. to 9:30 p.m. - \$63 per hour  
Shift VII, Saturdays from 9:30 p.m. to 1:30 a.m. - \$63 per hour  
Shift VIII, Sunday from 5:30 p.m. to 11:30 p.m. \$42 per hour

**Wage Scale for Musicians First Employed After the Execution of This Agreement:**

**Musician:**

Shift I, Mondays through Thursdays from 6:00 p.m. to 12:00 a.m. - \$30 per hour

Shift II, Fridays from 12:00 p.m. to 2:00 p.m. - \$30 per hour  
Shift III, Saturdays and Sundays from 10:30 a.m. to 3:00 p.m. - \$30 per hour  
Shift IV, Fridays from 5:30 p.m. to 9:30 p.m. - \$30 per hour  
Shift V, Fridays from 9:30 p.m. to 1:30 a.m. - \$30 per hour  
Shift VI, Saturdays from 5:30 p.m. to 9:30 p.m. - \$30 per hour  
Shift VII, Saturdays from 9:30 p.m. to 1:30 a.m. - \$30 per hour  
Shift VIII, Sunday from 5:30 p.m. to 11:30 p.m. \$30 per hour (ALJD 5-6)

Article III, Section B of the Master Agreement titled, “Scheduling and Reporting,” reads:

“Changes to Shifts: The Employer retains the sole and exclusive right to assign shifts or work schedules for Musicians. Changes to work schedules may be made by the Employer at any time, so long as it has notified the Musicians at least 24 hours prior to the change.” (ALJD 6:35).

## **2. Changes to Shift I and Shift VIII**

The Parties stipulated that the Respondent changed “Shift I” and “Shift VIII,” which were both noted in Addendum A to the Master Agreement, as follows:

1. Shift I, Beginning in November 2015 the AMA changed Shift 1 for Thursdays from 6:00 p.m.-12:00 a.m. (midnight) to 5:00 p.m.- 9:30 p.m. and created a second shift from 9:30 p.m.-1:30 a.m. Starting February 2016, those hours were changed to 5:00 p.m.- 9:00 p.m. and 9:00 p.m.- 1:00 a.m., respectively.

2. Shift VIII, Beginning in November 2015, the AMA changed Shift VIII for Sundays from 5:30 p.m.- 11:30 p.m. to 5:00 p.m.- 9:30 p.m. and created a second shift from 9:30 p.m. - 1:30 a.m. Starting February 2016, those hours were changed to 5:00 p.m. — 9:00 p.m. and 9:00 p.m.- 1:00 a.m., respectively.

3. Shift I, Beginning in February 2016, the AMA changed Shift I for Wednesdays from 6:00 p.m. — 12:00 a.m. (midnight) to 5:00 p.m. to 9:00 p.m. and created a second shift from 9:00 p.m. to 1:00 a.m.

4. Prior to making the shift changes noted above, the AMA provided at least 24 hours' notice to the Unit employees pursuant to Article III Section B of the Master Agreement. After July 1, 2015, the date the Master Agreement went into effect, AMA did not provide notice to the Union prior to making the shift changes noted above.

5. Shifts as noted herein worked by Unit employees relate to their hours, terms, and conditions of employment.

6. Regardless of the shift worked as noted in Addendum A, Unit employees' hourly wages remained the same as set forth in Addendum A to the Master Agreement. (ALJD 3:20-40)

### III. LEGAL ARGUMENT

**A. Exception No. 1: ALJ Biblowitz erred in failing to find that the Respondent unilaterally changed unit employees' shifts in violation of the Act. (ALJD 6:40-45).**

It is long settled that an employer may not make changes to mandatory subjects of bargaining without providing notice and an opportunity to bargain and that unit employees' shift hours are a mandatory subject of bargaining. *See e.g. NLRB v. Katz*, 369 U.S. 736 (1962); *See also, Control Servs., Inc.*, 303 NLRB 481, 484 (1991). Not every unilateral change to employee terms and conditions of employment constitutes a breach of the employer's bargaining obligation. The change must be "material, substantial, and significant." *See, e.g., Fremont Med. Ctr.*, 357 NLRB 1899, 1904 (2011); *Crittenden Hosp.*, 342 NLRB 686, 686 (2004). Because ALJ Biblowitz determined that the changes made by Respondent to employees' shifts were lawful, he did not reach a determination as to whether the changes were material or significant. It is clear that the Respondent's unilateral changes to the start times, end times, duration of shifts, and hours of work in direct conflict with Addendum A to the Master Agreement resulted in a significant reduction in pay for bargaining unit employees. For example, prior to the changes made by Respondent in November 2015, an employee working Shift I would have earned \$300 for the shift, but after November 2015, the same employee working Shift I would either earn \$225 for the first shift, or \$200 for the second shift depending on which hours they were scheduled. This change to employees' shifts constitutes a material, substantial, and significant change as it directly impacted employee pay.

The Union made clear in bargaining with Respondent that this was the type of change the Union opposed as the Union took the position that Unit employees *not* take a pay cut as a result of the Master Agreement. In fact, in analyzing the issue of bonus pay for the December 31, 2015 holiday, ALJ Biblowitz correctly recognized that, during negotiations of the Master Agreement,



the Union discussed its desire that employees not suffer a pay cut as a result of the Master Agreement. (ALJD 7:5-15). However, ALJ Biblowitz failed to recognize that the changes to employee shifts made by the Respondent also caused a recurring pay cut to employees, directly contradicting the position expressed by the Union during contract negotiations.

A party to a collective bargaining agreement waives the right to bargain over a mandatory subject of bargaining only by a “clear and unmistakable waiver.” *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 710, fn. 12 (1983); and *Mastro Plastics Corp.*, 103 NLRB 511 (1953), *enfd. NLRB v. Mastro Plastics Corp.*, 214 F.2d 462 (1954), *aff’d Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). In determining that a party to a collective bargaining agreement clearly and unmistakably waived its right to bargain over a mandatory subject of bargaining, a general “Management Rights” clause, by itself, is not sufficient. In *Gratiot Community Hosp.*, 312 NLRB 1075 (1993), the employer eliminated a nursing supervisor position entirely and claimed that the management rights clause, which allowed it to “decide on the number of employees,” constituted a clear and unmistakable waiver of the union’s right to bargain. The Board found that the parties’ collective bargaining agreement set forth the nursing supervisor’s rates of pay. When the employer eliminated the nursing supervisor position, it created a conflict with the collective bargaining agreement and the Board found that the conflict undermined the employer’s claim that the union waived the right to bargain. *Id.* at 1084.

Additionally, the Board has found that “[i]n order to find that the contract language meets the ‘clear and unmistakable’ waiver standard, ‘the contract language must be specific, or it must be shown that the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter.’” *Airo Die Casting, Inc.* 354 NLRB 92, 93 (2009) (citing *Trojan Yacht*, 319, NLRB 741, 742 (1995)). In

*Provena Hospital*, 350 NLRB 808 (2007), the respondent did not show “ that the meaning and potential implications of the management-rights clause in general...were ‘fully discussed and consciously explored’ during negotiations, or that the Union ‘consciously yielded or clearly and unmistakably waived its interest...’” *Id.* at 822.

ALJ Biblowitz erroneously determined that the “Management Rights” clause, or here, “Employer’s Rights” provision, was adequate to constitute a waiver. The ALJ cited to no Board authority in support of his conclusion that this contractual language amounted to a waiver. A close reading of the “Employer’s Rights” clause does not support a finding that the Union waived its right to bargain over employee shifts. The language in the first sentence of the “Employer’s Rights” clause states, “The Employer retains...all the rights, powers, and authority, *except as specifically abridged by this Agreement*” (emphasis added). The executed Master Agreement does contain such an abridgment, in the form of Addendum A. Addendum A specifically and unequivocally abridged the Respondent’s right to change working hours and shifts by specifically establishing set start and end times for every shift during the workweek. Not only did the Union fail to waive its right to bargain over changes to employees’ hours, the Parties bargained over the length of shifts and pay and included language in the Master Agreement to reflect that understanding.

Furthermore, the Respondent’s reliance on the Employer’s Rights clause is misplaced in that a reference to an employer’s right to schedule hours of work does not license an employer to unilaterally reduce employees’ hours. The Board has held that hours of work and duration of shifts are often distinct from the right to assign and schedule certain employees to work certain shifts. For example, in *Control Servs., Inc.*, 303 NLRB at 484, the Board found that the management-rights clause, which reserved to the employer the right to schedule hours of work

and to relieve employees of duty, did not grant the employer the unilateral right to reduce employees' hours because the union did not specifically waive its right to bargain over the number of hours employees would work. *See also, KIRO, Inc.*, 317 NLRB 1325, 1328 (1995), where the Board found that a management rights clause, which reserved the right to schedule and assign and to establish production standards, but did not specifically reference the employer's right to increase working hours or workload, lacked the specificity needed to establish a clear and unmistakable waiver by the union. Here, the Master Agreement's language permitting Respondent to "schedule and change working hours, shifts and days off" was not sufficient to permit Respondent to unilaterally split shifts, thereby reducing the employees' hours.

As explained in *Airo Die Casting, Inc.*, *supra*, the Respondent bears the burden of proving that the implications of the management-rights clause were fully discussed and consciously explored during negotiations with the Union. Not only is there no evidence of discussions between the Parties about the implications of the management-rights clause, but the record reflects no evidence that the Union waived its right to bargain over shift schedules, a subject already-bargained over by the Parties and memorialized in the Master Agreement at Addendum A. Instead, the evidence shows that the Union's position was that it did not want any of the bargaining unit musicians to suffer a pay cut as a result of the changes to the Master Agreement. ALJ Biblowitz should have found both that the Respondent acted in contravention of the negotiations that occurred between the Parties, and that the Union had not clearly and unmistakably waived its right to bargain over changes to Addendum A's very specific shift schedules.

In sum, the record evidence clearly establishes that Respondent, in violation of Section 8(a)(5) and 8(a)(1), unilaterally changed Unit employees' shifts without affording the Union with

notice and an opportunity to bargain in the absence of a clear and unmistakable waiver by the Union.

**B. Exception No. 2: The ALJ erred in finding that Respondent's conduct was consistent with the terms of the Master Agreement. (ALJD 6:40-45).**

In his decision, ALJ Biblowitz erred in finding that Respondent's conduct was consistent with the terms of the Master Agreement when it provided Unit employees with 24-hours' notice of a change to their shift lengths. (ALJD 6:40-50). ALJ Biblowitz clearly failed to consider the portion of Article IX of the Master Agreement, which states in pertinent part: "[t]he Employer retains, solely and exclusively, all the rights, powers, and authority which it exercised or possessed prior to the execution of this Agreement, *except as specifically abridged by this Agreement*" (emphasis added). While ALJ Biblowitz determined that the Respondent conformed to the Master Agreement in providing the Unit employees 24-hours' notice prior to making the change, ALJ Biblowitz did not address the fact that the Master Agreement contains a provision that explicitly limits the Respondent's rights, powers, and authority. Undoubtedly, the Parties agreed to the particular times and pay on predetermined days, which is reflected in Addendum A to the Master Agreement. In other words, even assuming that the Respondent provided Unit employees with 24-hours' notice prior to making changes to employee shifts, Respondent was nonetheless not privileged to make the change to employee shifts without providing the Union with notice and bargaining with the Union in the first place.

**IV. CONCLUSION**

Based on the entire record in this matter and on the foregoing argument, Counsel for the General Counsel respectfully requests that the Board grant these exceptions and amend the Conclusions of Law, Remedy, recommended Order, and Notice to Employees to reflect that the Respondent also violated the Act by making unilateral changes to unit employees' shift lengths.

Dated at Los Angeles, California this 28<sup>th</sup> day of February, 2017.

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